Editor's note: 80 I.D. 202

CLARK CANYON LUMBER COMPANY

IBLA 72-161 Decided February 14, 1973

Appeal from a decision by the Dillon, Montana, District Manager, Bureau of Land Management, unilaterally terminating appellant's timber sale contract no. 25050-TSO-05.

Affirmed.

Delegation of Authority: Generally--Timber Sales and Disposals

Upon request of the State Director, a District Manager, Bureau of Land Management, who has authority to enter into timber sale contracts also has authority to terminate such contracts when to do so would be in the best interest of the Government.

Timber Sales and Disposals

Section 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1970) gives the Secretary the power to dispose of timber on the public lands if to do so would not be detrimental to the public interest.

National Environmental Policy Act of 1969: Environmental Statements--Timber Sales and Disposals

In accordance with guidelines provided by the Council on Environmental Quality, 36 F.R. 7724, detailed environmental statements are not required under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331(2)(C) (1970), in connection with the cancellation of a timber sale contract where it is not reasonable to anticipate a cumulatively significant adverse effect on the environment.

Rules of Practice: Hearings

In connection with Government cancellation of a timber sale contract, a request for a hearing will be denied where no facts are alleged which, if proved, would warrant granting the relief sought.

APPEARANCES: Leonard B. Netzorg, Esq., Portland, Oregon, for appellant.

OPINION BY MR. GOSS

Clark Canyon Lumber Company has appealed from a decision dated August 1971, by the Dillon, Montana, District Manager which unilaterally terminated appellant's timber sale contract no. 25050-TSO-05 because "this sale does not meet the criteria of the National Environmental Policy Act and its continuance is not in the best interest of the public."

In June 1970 timber in the Jones Creek watershed of the Centennial Mountain Range was advertised for sale by the Bureau of Land Management pursuant to the Act of July 31, 1947, as amended, 30 U.S.C. §§ 601-604 (1970). The timber sale contract was awarded to appellant as highest bidder, and the contract was approved on August 3, 1970. The contract area consisted of sixteen cutting units in the Jones Creek area. The total sale price was $4,504.50 for an estimated 2145 mbf.

In July 1971, before appellant had taken any action on the contract, the Dillon District Manager informed the Montana State Director, Bureau of Land Management, that an inspection of the proposed cutting area revealed potentially serious problems which could arise from building roads and logging the area due to the proposed location of the roads and the extreme instability of the soils. He recommendation that consideration be given to placing the timber sale contract under suspension.

By memorandum dated August 19, 1971, the State Director advised the Dillon District Manager that because of the environmental considerations it would be in the best public interest for the Bureau of Land Management to unilaterally terminate the contract.

The State Director also received a memorandum from the Chief, Division of Resources, Bureau of Land Management, on August 23, 1971,

which set forth findings and recommendations following an August 5 inspection of the contract area. He found that road construction in several places would cause stream blockage; that an earth movement phenomenon existed in the area and disturbance would accelerate it; that natural reforestation was minimal and artificial reforestation had never been done in any areas logged in the past; that mistakes in layout had been made and to log the area in view of forest management's increased concern with environmental consequences would be disastrous and not in the public interest. He added that the State Office Forester, the State Office Recreation Planner and soil and watershed staff men from the Division of Resources visited the area and concurred in the findings.

The Chief, Division of Resources, recommended termination of the subject contract and that an intensive soil survey be undertaken in the whole Centennial area with a moratorium on future timber sales pending the outcome of the study. He stated that the Dillon District Manager had been advised to proceed with the termination on August 12, 1971.

The Dillon District Manager, acting upon the request of the Montana State Director, issued his decision unilaterally canceling the timber sale contract on August 20, 1971, and recommending that all moneys paid by appellant be refunded.

On appeal, appellant has made the following arguments:

(1) The officer who sought to terminate the contract lacked authority to do so.

(2) The contract should be performed, and the Board should direct specific performance of the contract.

(3) The Government's evaluation of the environmental consequences of timbering the contract area was wrong and in any event, the decision to terminate the contract was invalid because the Bureau failed to follow the requirements on the National Environmental Policy Act and the guidelines issued by the Council on Environmental Quality.

(4) The contract should be amended by eliminating the cutting areas about which there is environmental concern and by substituting other areas which would insure appellant a comparable volume of timber without an increase in cost. Appellant would assent to a substitution of other areas in lieu of cutting units 4, 5, 6, 14, 15 and 16.

(5) The Government's purported termination of the contract occurred while appellant was negotiating a sale of all its assets and the Government knew that its action would cause appellant extraordinary harm.

The authority to enter into a government contract carries with it the power to terminate the contract when it appears that such action would be in the best interest of the Government. Cf. United States v. Corliss Steam Engine Co., 91 U.S. 321 (1875); cf. 29 Comp. Gen. 36 (1949). The decision to terminate and the propriety of the termination are matters for administrative determination. 18 Comp. Gen. 826 (1939). While the power to terminate is inherent, there is also a duty to compensate the contractor when the Government has

acted unilaterally. Such a termination, in the absence of a statute or contract clause establishing the rights, is a breach of contract for which the contractor is entitled to damages. United States v. Purcell Envelope Co., 249 U.S. 313 (1919). In the absence of a statute so authorizing, specific performance is not a judicial remedy available against the Government. United States ex rel. Shoshone Irr. Dist. v. Ickes, 70 F.2d 771 (D.C. Cir. 1934), cert. denied, 293 U.S. 571 (1934).

Appellant contends that the Dillon District Manager who terminated the timber sale contract, involved herein, lacked authority to do so. In 43 CFR 5400.0-5 "authorized officer" is defined as "an employee of the Bureau of Land Management to whom has been delegated the authority to take action" on timber sale contracts. The authority to contract for the sale of timber and to administer timber sales was delegated to the state directors and district managers by Bureau Order No. 701, dated July 23, 1964 (29 F.R. 10526). Thus the State Director and District Manager are "authorized officers" and as such they have the power to terminate a contract when such is in the best interests of the Government. See Irvin Pearce d/b/a Pearce Bros., 5 IBLA 373 (1972).

Having found that the Dillon District Manager was not acting outside the scope of his authority in unilaterally terminating the

timber sale contract, we must ascertain whether the action herein was justified as being in the public interest. Section 1 of the Act of July 31, 1947, as amended, 30 U.S.C. § 601 (1970) grants to the Secretary of the Interior the power to dispose of timber on the public lands subject to the limitation that disposal should not be made if to do so would be detrimental to the public interest.

The District Manager's decision stated that the sale did not meet the criteria set out in the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (1970). In section 101 of the Act, 42 U.S.C. § 4331 (1970), Congress declared the policy of the federal government to be to foster and promote the general welfare and to create and maintain conditions under which man and nature can coexist in productive harmony. In the same section Congress said that:

> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--
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> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
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> * * * * * * *
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> (3) attain the widest range of beneficial uses of the environment without degradation, risk

to health or safety, or other undesirable and unintended consequences;

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The decision to unilaterally terminate the contract was made only after them contract area was inspected by the Dillon District Manager, the Dillon District Forester, personnel from the State Office, Division of Resources, the State Office Forester and the State Office Recreational Planner. All were in agreement that logging in the area would not be in the best public interest because of the potential hazards of erosion and stream pollution.

In addition, on October 22, 1971, the Acting Director of the Geological Survey filed a report with the Director, Bureau of Land Management, evaluating the probable effects of timbering on slope stability in the Centennial Mountains. The evaluation cited three ways in which timber harvesting could be expected to adversely effect the stability of the slopes in the Centennial Mountains:

(1) Road construction in unstable areas could cause mass wasting.

(2) Timber harvesting would result in higher soil moisture in the cut area which in turn would increase the possibility of land slides.

(3) Decaying tree roots following timber harvesting would reduce soil stability.

The report also stated that logging in the Price Creek and Peet Creek watersheds resulted in mass wasting and land sliding and that a similar phenomenon could be expected in Jones Creek if road construction and logging were initiated there.

The report recommended that considerable thought be given to the wisdom of logging any area in the Centennial Mountains because of the obvious threat to the environment.

A rather extensive soil inventory study of the Centennial Mountain area was filed with the State Director, Montana, by two soil scientists on November 12, 1971. The study delineated safeguards which would be necessary to reduce the environmental impact of building roads and logging in the area. The study included a topographical map color keyed to soil associations. The soils in the contract area present severe to moderate limitations on road construction.

These two reports, filed subsequent to the District Manager's decision, support his action in terminating the contract.

Appellant filed a geological inspection report with his statement of reasons. The report was compiled for the Dillon, Montana,

Chamber of Commerce by William J. McMannis, geologist. Mr. McMannis spent one day investigating the contract area. He concluded that of the sixteen cutting areas six were located in areas in which it would be "risky" to construct roads. But he saw no geological reason why the Jones Creek area should not be logged as the Bean Creek and Price Creek areas had been.

A memorandum from the State Director, Montana, to the Director, Bureau of Land Management, dated October 22, 1971, explained the McMannis report. The State Director felt that Department experience in previous logging of the geologically similar areas of Price and Bean Creeks did not justify logging the Jones Creek area.

The information in the record concerning the environmental considerations of logging the Jones Creek watershed weigh heavily in favor of the action taken by the District Manager. The record supports the conclusion that logging the contract area would be inconsistent with national environmental policy; would not be good forest management in light of increased environmental concern; would be contrary to the goal of promoting efforts to prevent or eliminate destruction of the environment; and, therefore, would not be in the best public interest.

There is no validity to appellant's argument that the Government's action in terminating the contract was invalid because the Government did not conform to the requirements of the National Environmental Policy Act and the guidelines of the Council on Environmental Quality. We assume appellant is referring to section 102 of the Act, 42 U.S.C. § 4332 (1970) which reads in part:

> § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.
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> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--
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> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have a impact on man's environment;
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> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed a action,

> (iv) the relationship between local s short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

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Under part (2)(C) of section 102, the compilation of an environmental impact statement is required only in connection with legislation and other major federal actions significantly affecting the quality of the human environment. The section has been used most often by environmental groups to force governmental agencies to consider the environmental impact of proposed agency action, e.g., Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749 (D.C. Ark. 1971). The usual charge is that the agency has not taken adequate consideration of the impact of its action on the environment.

The Council on Environmental Quality has set forth guidelines, 36 F.R. 7724, to be used in deciding whether a proposed action requires an environmental statement--

> 5. Actions included. The following criteria will be employed by agencies in determining whether a proposed action requires the preparation of an environmental statement:

> (a) "Actions" include but are not limited to:
> (i) Recommendations or favorable reports relating to legislation including that for appropriations. * * *
> (ii) Projects and continuing activities: directly undertaken by Federal agencies; supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance; involving a Federal lease, permit, license, certificate or other entitlement for use;
> (iii) Policy, regulations, and procedure-making.
> (b) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). * * *

In this case the Bureau of Land Management realized, after the contract was entered into, that the cutting of timber in the contract area would not be in the best public interest because of the potential detrimental environmental consequences of the action. As administrator of the public lands, the Department is obligated to consider such environmental consequences.

While we realize that the unilateral termination of a government contract is a serious matter, affecting vested contractual rights of a timber purchaser, we cannot interpret the National Environmental Policy Act as requiring the filing of an environmental impact statement under the facts herein. In Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1403 (D.C.D.C. 1971) it is recognized that the requirements of section 102 part (2)(A) "should be judged in light of the scope of the proposed program and the

extent to which existing knowledge raises the possibility of potential adverse environmental effects." The same standard applies to section 102 part (2)(C) under the Council on Environmental Quality guidelines, supra. An environmental impact statement is not required unless it is reasonable to anticipate a cumulatively significant adverse impact on the environment from Federal action.

Appellant has not alleged that cancellation of the contract would have any potential adverse effect on the environment, therefore it is not necessary to determine whether the cancellation would constitute a major Federal action.

Appellant also argues that the Government should amend the contract, and he represents that he would agree to a deletion of cutting units nos. 4, 5, 6, 14, 15, and 16, if areas yielding equal volumes of timber could be substituted. It is not necessary that such proposals be discussed herein. Appellant's evidence seems to concede that six of the sixteen units should not be logged, and he conditionally proposes their deletion from the contract. 43 CFR 5401.0-6 provides that all timber sales "other than those specified in § 5402.0-6 shall be made only after inviting competitive bids." Under such facts it was neither arbitrary nor an abuse of discretion for the District Manager to terminate rather than substantially

amend the contract. See Kerr McGee Corporation, et al., 6 IBLA 108 (1972).

As to appellant's request for a hearing, the only question before the Board is whether there is a sound basis for the judgment that was exercised. Under 43 CFR 4.415 the ordering of a hearing is within the discretion of the Board. There being no factual dispute as to the premise that six of the units should not be logged, and that deletion of and substitution for the six units would substantially change the contract, the Board concludes as a matter of law that the District Manager acted within his discretion in rescinding rather than substantially modifying the contract. There being no facts alleged which would alter this conclusion, the request for a hearing should be denied. Leo J. Kottas, Earl Lutzenhizer, 73 I.D. 123 (1966); Harold E. and Alice L. Trowbridge,
A-30954 (January 17, 1969).

Appellant has further charged that the Government inflicted extraordinary harm by terminating the contract when it had knowledge that appellant was negotiating a sale of its assets. Such an argument does not go to the merits of this appeal. If appellant is attempting to infer a wrongful intent on the part of the Government, the argument is best espoused in a suit for damages.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Government's motion to dismiss is denied and the decision appealed from is affirmed.

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Joseph W. Goss, Member

We concur:

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Martin Ritvo, Member

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Edward W. Stuebing, Member